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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 ALPHONSO DeCARLOS MYLES,)
9)
10 Petitioner,) CIV 08-1482 PHX MHM (MEA)
11)
12 v.) REPORT AND RECOMMENDATION
13)
14 WARDEN PALOSAARI, et al.,)
15)
16 Respondents.)
17)
18)
19)
20)

21 TO THE HONORABLE MARY H. MURGUIA:

22 Petitioner filed a *pro se* petition for a writ of habeas
23 corpus pursuant to 28 U.S.C. § 2254 on August 11, 2008.
24 Respondents filed an Answer to Petition for Writ of Habeas
25 Corpus ("Answer") (Docket No. 9) on November 20, 2008.
26 Petitioner filed a reply (Docket No. 10) to the answer on
27 December 22, 2008.

28 **I Procedural background**

On June 16, 2003, a man riding a bicycle in Phoenix was
shot multiple times by an unknown assailant; Petitioner was
apprehended nearby that same night and questioned in connection
with the crime. See Answer, Exh. X.

On June 26, 2003, in grand jury proceedings in Maricopa
County in CR2003-016060, a prosecutor presented an investigation
involving an "alleged aggravated assault and misconduct

1 involving weapons" regarding the events of June 16, 2003. Id.,
2 Exh. X. The grand jury voted a true bill against Petitioner for
3 those crimes. Id., Exh. X. Accordingly, Petitioner was charged
4 by indictment with one count of aggravated assault and one count
5 of weapons misconduct. Id., Exh. Y at 2.

6 On August 8, 2003, a hearing was conducted regarding
7 Petitioner's potential acceptance of a plea agreement to the
8 charges of weapons misconduct and aggravated assault. See
9 Petition, Attach.; Answer, Exh. X. Petitioner's counsel at that
10 time, Mr. Jolly, informed the trial court that Petitioner had
11 decided not to accept the proffered plea agreement, providing
12 for a sentence of twelve years imprisonment. See Answer, Exh.
13 X at 3. Petitioner indicated at the August 8 hearing that he
14 knew that, if he did not plead guilty in that case at that time,
15 the state intended to dismiss the original indictment and re-
16 file more serious charges against Petitioner. See id., Exh. X
17 at 3-4.

18 The trial court addressed Petitioner directly at that
19 time, noting a prior conversation between the court and
20 Petitioner about the plea agreement and stating "it wasn't a
21 terribly good plea offer as I recall." Id., Exh. X at 4. The
22 trial court also stated: "You probably would done as well if you
23 pled to the charge without the plea agreement. If they dismiss
24 and refile it, you are looking at a more serious charge, and
25 that opportunity will have come and gone.(sic)" Id., Exh. X at
26 4. Petitioner chose not to plead guilty at that time. Id.,
27 Exh. X at 4.

1 In an indictment issued by a grand jury on September 5,
2 2003, in Maricopa County Superior Court docket number CR2003-
3 020303, Petitioner was again accused of the crimes occurring on
4 June 16, 2003, i.e., shooting an adult male multiple times while
5 the man was riding a bicycle on a Phoenix city street. Id.,
6 Exh. A & Exh. B. The indictment charged Petitioner with one
7 count of attempted first-degree premeditated murder or, in the
8 alternative, attempted second-degree murder. Id., Exh. B. The
9 indictment also charged Petitioner with one count of aggravated
10 assault. Id., Exh. B. On September 26, 2003, the state alleged
11 Petitioner had previously been convicted of a felony. Id., Exh.
12 I at 1.

13 On February 9, 2004, a pretrial hearing was conducted
14 at which Petitioner was offered a plea agreement exposing him to
15 a term of fifteen years imprisonment. Id., Exh. X. Petitioner
16 was represented by different counsel, Ms. Hernandez, at that
17 time. The state trial judge conducting the hearing informed
18 Petitioner that the jury could be informed he had a prior felony
19 conviction and that "[a] judge could consider it at the time of
20 sentencing." Id., Exh. X at 6. Petitioner stated he was not
21 interested in the plea agreement and asked to be provided
22 transcripts of the grand jury proceedings. Id., Exh. X at 9-10.
23 After conferring with his counsel at the court's urging,
24 however, Petitioner asked to think about the plea offer
25 overnight. Id., Exh. X at 10-13. Petitioner did not accept the
26 plea offer.

1 Petitioner's trial lasted for four days. See id., Exh.
2 H & Exh. I. The victim testified at the trial that Petitioner
3 was the person who shot him. Id., Exh. I. The state alleged
4 Petitioner shot the victim at least once and then, after the
5 victim fell to the ground, Petitioner stood over the victim and
6 shot him at least one more time. Id., Exh. I. Additionally,
7 the jury heard testimony that Petitioner was apprehended near
8 the scene of the crime in a vehicle described by witnesses as
9 that driven by the shooter, that Petitioner had gunpowder
10 residue on his hands, and that the gun used to shoot the victim
11 was located in the car Petitioner was driving when apprehended.
12 Id., Exh. I.

13 On February 24, 2004, the jury returned a verdict
14 finding Petitioner guilty of attempted first degree murder and
15 guilty of aggravated assault. Id., Exh. D. The jury also found
16 the offenses were dangerous. Id., Exh. D.

17 On April 26, 2004, Petitioner was sentenced to an
18 aggravated term of 15 years imprisonment pursuant to his
19 conviction for attempted murder and a concurrent aggravated term
20 of 10 years imprisonment pursuant to his conviction for
21 aggravated assault. Id., Exh. E. Petitioner was given credit
22 for 315 days of presentence incarceration. Id., Exh. E.

23 At the sentencing hearing the prosecutor argued for a
24 harsh sentence citing, *inter alia*, the fact that Petitioner had
25 a prior felony conviction for possession of a controlled
26 substance while also in possession of a firearm. Id., Exh. E at
27 6. The prosecutor also cited the fact that Petitioner had been
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1 imprisoned for violating his probation on that conviction. Id.,
2 Exh. E at 6. The prosecutor also averred Petitioner was a
3 "prohibited possessor," and that the original charges against
4 Petitioner had "included misconduct involving weapons. The
5 State ended up not refiling those due to just the cost of having
6 to bring in a California civil rights restoration clerk to come
7 back to testify his rights hadn't been restored...." Id., Exh.
8 E at 7.

9 Petitioner filed a timely direct appeal of his
10 convictions and sentences. Id., Exh. F. In his direct appeal
11 Petitioner asserted he was entitled to re-sentencing because he
12 was sentenced to an aggravated term of imprisonment based on
13 factual findings made by the trial court rather than the jury.
14 Id., Exh. I. In a decision entered May 22, 2005, the Arizona
15 Court of Appeals affirmed Petitioner's convictions and
16 sentences. Id., Exh. K. The appellate court concluded
17 Petitioner's claim for relief was without merit because
18 Petitioner's sentence was aggravated due to a prior conviction.
19 Id., Exh. K. The appellate court also concluded no reasonable
20 juror could have failed to find Petitioner's crime "senseless"
21 and that the victim of the crime suffered permanent injury and
22 emotional harm. Id., Exh. K. Accordingly, the Arizona Court of
23 Appeals concluded, any imposition of an aggravated term of
24 imprisonment was harmless error. Id., Exh. K.

25 Petitioner sought review of the Court of Appeals'
26 decision by the Arizona Supreme Court, which summarily denied
27 review on October 31, 2005. Id., Exh. N & Exh. O.

1 Petitioner filed a notice of his intent to seek post-
2 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
3 Procedure, on May 3, 2004, during the pendency of his direct
4 appeal. Id., Exh. H. Petitioner moved to dismiss this action
5 without prejudice on July 1, 2004. Id., Exh. P. On July 5,
6 2004, the state trial court dismissed the post-conviction
7 action. Id., Exh. Q.

8 After his direct appeal concluded, on January 13, 2006,
9 Petitioner re-filed his state action for post-conviction relief
10 pursuant to Rule 32, Arizona Rules of Criminal Procedure. Id.,
11 Exh. R. Petitioner was appointed counsel for these proceedings.
12 Id., Exh. S. Due to a conflict, Petitioner's appointed counsel
13 was replaced on July 31, 2006. Id., Exh. U.

14 On September 5, 2006, Petitioner's appointed post-
15 conviction counsel informed the court that she could find no
16 meritorious issues to raise on Petitioner's behalf. Id., Exh.
17 V. Petitioner filed a pro per petition for post-conviction
18 relief on April 27, 2007. Id., Exh. X. Petitioner asserted his
19 convictions and sentences should be reversed because: (1) he was
20 the victim of prosecutorial vindictiveness; (2) the indictment
21 was both multiplicitous and duplicitous because there was only
22 one victim; (3) his trial, appellate, and post-conviction
23 counsel were all unconstitutionally ineffective; (4) the state
24 suppressed evidence at trial; (5) the victim gave perjured
25 testimony at Petitioner's trial; (6) Petitioner was entitled to
26 have a jury find each factor used to aggravate his sentence.
27 Id., Exh. X & Exh. Y.

1 On August 16, 2007, the Maricopa County Superior Court
2 denied relief, summarily stating some of Petitioner's claims
3 were precluded and that the remaining claims did not state a
4 colorable claim for relief. Id., Exh. AA. On September 11,
5 2007, Petitioner sought an extension of the time allowed for
6 appealing this decision.¹ Petitioner filed a motion seeking
7 resolution of the September 11 motion on January 22, 2008. Id.,
8 Exh. CC. On February 11, 2008, the state trial court denied
9 Petitioner's motion for an extension of the time allowed to seek
10 review of the trial court's decision by the state appellate
11 court. Id., Exh. DD.

12 In his federal habeas petition Petitioner alleges he is
13 entitled to relief because his sentence violates his Sixth
14 Amendment rights, i.e., his sentence was predicated on facts
15 found by a judge and not a jury (Ground I). See Docket No. 1.
16 Petitioner also alleges his Fourteenth Amendment right to due
17 process of law was violated because the prosecution was
18 vindictive; Petitioner asserts the indictment was amended to
19 include more serious charges because he refused to accept a plea
20 deal (Ground II). Petitioner further contends that his Fifth
21 Amendment right to be free of double jeopardy was violated
22 because his crime involved only one victim and because the
23 indictment was amended to alter the initial charges against him
24 to more serious charges (Ground III). Petitioner also maintains

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26 ¹ Petitioner alleges he sought review of the trial court's
27 denial of Rule 32 relief by the Court of Appeals in a petition for
28 review filed "11/07," which is not reflected in the docket of the case
provided by Respondents. See Petition; Answer at 13.

1 he was denied his right to the effective assistance of trial
 2 counsel because counsel did not meet with him and because his
 3 trial and appellate counsel did not assert his right to be free
 4 of a multiplicitous and duplicitous indictment (Ground IV).

5 **II Relevant law**

6 **A. Exhaustion**

7 Absent particular circumstances, the District Court
 8 should not entertain the merits of a petition for a writ of
 9 habeas corpus before the petitioner's state remedies have been
 10 "exhausted." See 28 U.S.C. § 2254(b) & (c) (2006 & Supp. 2008).²
 11 Although it may deny relief on the merits of an unexhausted
 12 claim, the District Court may not grant federal habeas relief on
 13 the merits of a claim which has not been exhausted in the state
 14 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
 15 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
 16 30, 111 S. Ct. 2546, 2554-55 (1991).

17 To properly exhaust a federal habeas claim the
 18 petitioner must afford the state courts the opportunity to rule
 19 upon the merits of the constitutional claim by "fairly
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22 An application for a writ of habeas corpus on
 23 behalf of a person in custody pursuant to the
 judgment of a State court shall not be granted
 unless it appears that--

24 (A) the applicant has exhausted the remedies
 available in the courts of the State; or

25 (B)(i) there is an absence of available State
 corrective process; or

26 (ii) circumstances exist that render such process
 ineffective to protect the rights of the
 applicant.

27 28 U.S.C.A. § 2254(b)(1) (2006 & Supp. 2008).

1 presenting" the claim to the state's "highest" court in a
2 procedurally correct manner. See, e.g., Castille v. Peoples,
3 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose v.
4 Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005). The Ninth
5 Circuit Court of Appeals has concluded that, in non-capital
6 cases arising in Arizona, the "highest court" test of the
7 exhaustion requirement is satisfied if the habeas petitioner
8 presented his claim to the Arizona Court of Appeals, either on
9 direct appeal or in a petition for post-conviction relief. See
10 Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999). See
11 also Crowell v. Knowles, 483 F. Supp. 2d 925, 932 (D. Ariz.
12 2007) (providing a thorough and well-reasoned discussion of what
13 constitutes the "highest court" in Arizona for purposes of
14 exhausting a non-capital conviction or sentence).

15 **B. Procedural default**

16 A federal habeas petitioner has not exhausted a federal
17 habeas claim if he still has the right to raise the claim "by
18 any available procedure" in the state courts. 28 U.S.C. §
19 2254(c) (1994 & Supp. 2008). Because the exhaustion requirement
20 refers only to remedies still available to the petitioner at the
21 time they file their action for federal habeas relief, it is
22 satisfied if the petitioner is procedurally barred from pursuing
23 their claim in the state courts. See Woodford v. Ngo, 548 U.S.
24 81, 92-93, 126 S. Ct. 2378, 2387 (2006); Castille, 489 U.S. at
25 351, 109 S. Ct. at 1060. If it is clear the habeas petitioner's
26 claim is procedurally barred pursuant to state law, the claim is
27 exhausted by virtue of the petitioner's "procedural default" of
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1 the claim. See, e.g., Woodford, 548 U.S. at 92-93, 126 S. Ct.
2 at 2387.

3 Procedural default occurs when a petitioner has never
4 presented a federal habeas claim in state court and is now
5 barred from doing so by the state's procedural rules, including
6 state rules regarding waiver and the preclusion of claims. See
7 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060; Tacho v.
8 Martinez, 862 F.2d 1376, 1378 (9th Cir. 1988). Procedural
9 default also occurs when a petitioner did present a claim to the
10 state courts, but the state courts did not address the merits of
11 the claim because the petitioner failed to follow a state
12 procedural rule. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797,
13 802, 111 S. Ct. 2590, 2594-95 (1991); Coleman, 501 U.S. at 727-
14 28, 111 S. Ct. at 2553-57; Ellis v. Armenakis, 222 F.3d 627, 632
15 (9th Cir. 2000); Szabo v. Walls, 313 F.3d 392, 395 (7th Cir.
16 2002).

17 Because the Arizona Rules of Criminal Procedure
18 regarding timeliness, waiver, and the preclusion of claims bar
19 Petitioner from now returning to the state courts to exhaust any
20 unexhausted federal habeas claims, Petitioner has exhausted, but
21 procedurally defaulted, any claim not previously fairly
22 presented to the Arizona Court of Appeals in a procedurally
23 correct manner. See Insyxiengmay v. Morgan, 403 F.3d 657, 665
24 (9th Cir. 2005); Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir.
25 2002). See also Stewart v. Smith, 536 U.S. 856, 860, 122 S. Ct.
26 2578, 2581 (2002) (holding Arizona's state rules regarding the
27 waiver and procedural default of claims raised in attacks on
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1 criminal convictions are adequate and independent state grounds
2 for affirming a conviction and denying federal habeas relief on
3 the grounds of a procedural bar); Ortiz v. Stewart, 149 F.3d
4 923, 931-32 (9th Cir. 1998).

5 **C. Cause and prejudice**

6 Federal habeas relief based on a procedurally defaulted
7 claim is barred unless the petitioner can demonstrate a
8 fundamental miscarriage of justice will occur if the Court does
9 not consider the merits of the claim, or cause and actual
10 prejudice to excuse their default of the claim. See House v.
11 Bell, 547 U.S. 518, 535-36, 126 S. Ct. 2064, 2076 (2006); Dretke
12 v. Haley, 541 U.S. 386, 392-93, 124 S. Ct. 1827, 1852 (2004).

13 "Cause" is a legitimate excuse for the petitioner's
14 procedural default of the claim and "prejudice" is actual harm
15 resulting from the alleged constitutional violation. See Thomas
16 v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate
17 cause, a petitioner must show the existence of some external
18 factor which impeded his efforts to comply with the state's
19 procedural rules. See Vickers v. Stewart, 144 F.3d 613, 617
20 (9th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305
21 (9th Cir. 1996). To establish prejudice, the petitioner must
22 show that the alleged constitutional error worked to his actual
23 and substantial disadvantage, infecting his criminal proceedings
24 with constitutional violations. See Vickers, 144 F.3d at 617;
25 Correll v. Stewart, 137 F.3d 1404, 1415-16 (9th Cir. 1998).
26 Establishing prejudice requires a petitioner to prove that, "but
27 for" the alleged constitutional violations, there is a
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1 reasonable probability he would not have been convicted of the
2 same crimes. See Manning v. Foster, 224 F.3d 1129, 1135-36 (9th
3 Cir. 2000); Ivy v. Caspari, 173 F.3d 1136, 1141 (8th Cir. 1999).
4 Although both cause and prejudice must be shown to excuse a
5 procedural default, the Court need not examine the existence of
6 prejudice if the petitioner fails to establish cause. See Engle
7 v. Isaac, 456 U.S. 107, 134 n.43, 102 S. Ct. 1558, 1575 n.43
8 (1982); Thomas, 945 F.2d at 1123 n.10.

9 Allegedly ineffective assistance of appellate counsel
10 does not establish cause for the failure to properly exhaust a
11 habeas claim in the state courts unless the specific Sixth
12 Amendment claim providing the basis for cause was itself
13 properly exhausted. See Edwards v. Carpenter, 529 U.S. 446,
14 451, 120 S. Ct. 1587, 1591 (2000); Tacho, 862 F.2d at 1381;
15 Deitz v. Money, 391 F.3d 804, 809 (6th Cir. 2004)("[a]ttorney
16 error does not constitute cause to excuse a procedural default
17 unless counsel's performance was constitutionally deficient.").
18 See also Coleman, 501 U.S. at 755, 111 S. Ct. at 2567 ("We
19 reiterate that counsel's ineffectiveness will constitute cause
20 only if it is an independent constitutional violation").

21 Review of the merits of a procedurally defaulted habeas
22 claim is required if the petitioner demonstrates review of the
23 merits of the claim is necessary to prevent a fundamental
24 miscarriage of justice. See Dretke, 541 U.S. at 393, 124 S. Ct.
25 at 1852; Schlup v. Delo, 513 U.S. 298, 316, 115 S. Ct. 851, 861
26 (1995); Murray v. Carrier, 477 U.S. 478, 485-86, 106 S. Ct.
27 2639, 2649 (1986). A fundamental miscarriage of justice occurs

1 only when a constitutional violation has probably resulted in
2 the conviction of one who is factually innocent. See Murray,
3 477 U.S. at 485-86, 106 S. Ct. at 2649; Thomas v. Goldsmith, 979
4 F.2d 746, 749 (9th Cir. 1992).

5 **D. Standard of review with regard to properly exhausted**
6 **claims for relief**

7 The Court may not grant a writ of habeas corpus to a
8 state prisoner on a claim adjudicated on the merits in state
9 court proceedings unless the state court reached a decision
10 contrary to clearly established federal law, or one involving an
11 unreasonable application of clearly established federal law, or
12 unless the state court's decision was based on an unreasonable
13 determination of the facts in light of the evidence presented in
14 the state proceeding. See 28 U.S.C. § 2254(d) (1994 & Supp.
15 2008); Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007);
16 Carey v. Musladin, 549 U.S. 70, 74-75, 127 S. Ct. 649, 653
17 (2006); Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456,
18 2467-68 (2005); Cook v. Schriro, 516 F.3d 802, 816 (9th Cir.
19 2008).

20 United States Supreme Court holdings at the time of the
21 state court's decision are the source of "clearly established
22 federal law" for the purpose of federal habeas review. Williams
23 v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000);
24 Barker v. Fleming, 423 F.3d 1085, 1093 (9th Cir. 2005). The
25 Court must decide whether the United States Supreme Court has
26 "clearly established" the point of law Petitioner relies upon as
27 a basis for habeas relief by examining the holdings of the

1 Supreme Court, rather than the opinions of the lower courts or
2 the Supreme Court's dicta. See Carey, 549 U.S. at 74-75, 127 S.
3 Ct. at 653.

4 Unless United States Supreme Court precedent has
5 clearly established a rule of law, the writ will not issue based
6 on a claimed violation of that rule, see Alvarado v. Hill, 252
7 F.3d 1066, 1069 (9th Cir. 2001), because federal courts are
8 "without the power" to extend the law beyond Supreme Court
9 precedent. See Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000).
10 If the United States Supreme Court has not addressed the issue
11 raised by Petitioner in its holdings, the state court's
12 adjudication of the issue cannot be contrary to, or an
13 unreasonable application of, clearly established federal law.
14 See Stenson v. Lambert, 504 F.3d 873, 881 (9th Cir. 2007),
15 citing Kane v. Espitia, 546 U.S. 9, 10, 126 S. Ct. 407, 408
16 (2006). Therefore, if the issue raised by the petitioner "is an
17 open question in the Supreme Court's jurisprudence," the Court
18 may not issue a writ of habeas corpus on the basis that the
19 state court unreasonably applied clearly established federal law
20 by rejecting the precise claim presented by the petitioner.
21 Cook, 516 F.3d at 818, quoting Carey, 549 U.S. at 75, 127 S. Ct.
22 at 654; Crater v. Galaza, 491 F.3d 1119, 1123 (9th Cir. 2007),
23 cert. denied, 128 S. Ct. 2961 (2008).

24 When more than one state court has adjudicated a claim,
25 the Court must analyze the last "reasoned" decision to determine
26 if the state's denial of relief on the claim was clearly
27 contrary to federal law. See Barker, 423 F.3d at 1091-92 & n.3.

1 When there is no "reasoned" state court decision explaining the
 2 state's denial of a claim presented in a federal habeas
 3 petition, the District Court must perform an independent review
 4 of the record to ascertain whether the state court's decision
 5 summarily denying the claim was objectively reasonable. See
 6 Medley v. Runnels, 506 F.3d 857, 863 & n.3 (9th Cir. 2007),
 7 cert. denied, 128 S. Ct. 1878 (2008); Stenson, 504 F.3d at 890;
 8 Pham v. Terhune, 400 F.3d 740, 742 (9th Cir. 2005). If the
 9 Court determines that the state court's decision was contrary to
 10 clearly established law, the Court must review whether
 11 Petitioner's constitutional rights were violated, i.e., the
 12 state's ultimate denial of relief, without the deference to the
 13 state court's decision that the Anti-Terrorism and Effective
 14 Death Penalty Act ("AEDPA") otherwise requires. See Frantz v.
 15 Hazey, 513 F.3d 1002, 113-15 (9th Cir. 2008). See also Larson
 16 v. Palmateer, 515 F.3d 1057, 1061-62 (9th Cir. 2008).³ With
 17 regard to his entitlement to federal habeas relief, Petitioner
 18 bears the burden of proving his constitutional rights were

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20 Under AEDPA, a federal court is permitted to
 21 grant habeas relief only if the state court
 22 adjudication "resulted in a decision that was
 23 contrary to, or involved an unreasonable
 24 application of, clearly established Federal law,
 25 as determined by the Supreme Court of the United
 26 States." 28 U.S.C. § 2254(d)(1). ... If the state
 27 court reaches the merits without providing
 reasoning for us to review, however, "we
 independently review the record to determine
 whether the state court clearly erred in its
 application of Supreme Court law." Brazzel v.
Washington, 491 F.3d 976, 981 (9th Cir. 2007)
 (internal quotation marks omitted).
Larson v. Palmateer, 515 F.3d 1057, 1061-62 (9th Cir. 2008).

1 violated. See, e.g., Cook, 516 F.3d at 816.

2 Additionally, a section 2254 writ of habeas corpus is
3 available only when there has been a transgression of federal
4 law binding on state courts. See Engle v. Isaac, 456 U.S. 107,
5 119, 102 S. Ct. 1558, 1567 (1982); Middleton v. Cupp, 768 F.2d
6 1083, 1085 (9th Cir. 1985). Habeas relief may not be premised
7 on the mere allegation that something in the state court
8 proceedings was contrary to general notions of fairness; the
9 United States Constitution must specifically protect against the
10 alleged unfairness before the petitioner may obtain relief. See
11 Engle, 456 U.S. at 119, 102 S. Ct. at 1567; Middleton, 768 F.2d
12 at 1088.

13 **III. Analysis of Petitioner's claims for relief**

14 **A. Petitioner alleges he is entitled to relief because**
15 **his sentence violates his Sixth Amendment rights.**

16 Petitioner raised this claim in his direct appeal and
17 the Arizona Court of Appeals concluded Petitioner was not
18 entitled to relief on the merits of this claim. Respondents
19 allow the claim was properly exhausted and contend the Arizona
20 state court's decision was not clearly contrary to established
21 federal law.

22 Petitioner was convicted of attempted first degree
23 murder and aggravated assault. The trial court sentenced
24 Petitioner to an aggravated term of 15 years imprisonment on the
25 attempted first degree murder conviction and a concurrent
26 sentence of 10 years imprisonment on the aggravated assault
27 conviction. Answer, Exh. E.

1 At Petitioner's sentencing hearing, Petitioner's
2 counsel allowed that Petitioner has a prior felony history. The
3 sentencing court stated:

4 There are aggravating factors here, the prior
5 felony convictions, the senselessness of this
6 crime is an aggravating factor, the facts
7 that the victim suffered injuries which are
8 permanent in nature, and the emotional harm
9 to the victim. I have considered those in my
10 sentence.

11 Id., Exh. E at 15-16.

12 When rejecting the claim that his sentence was
13 aggravated based on factors not found by a jury, the Arizona
14 Court of Appeals noted that, pursuant to state statutes,
15 Petitioner's sentence could be aggravated "'within the range
16 prescribed under this subsection pursuant to the terms of § 13-
17 702, subsections B, C, and D.'" Id., Exh. K at 5. The Arizona
18 Court of Appeals "agree[d] that the jury did not make any
19 specific findings regarding aggravating factors, and the judge
20 imposed an aggravated sentence." Id., Exh. K at 6. However,
21 the Arizona Court of Appeals concluded the error was harmless
22 because no reasonable jury could fail to find the aggravating
23 factors relied upon by the sentencing court when aggravating the
24 sentence. The Arizona Court of Appeals further found that
25 Petitioner's sentence was aggravated by a prior felony
26 conviction which was "not subject to the rules of Apprendi or
27 Blakely, meaning it was not error, let alone harmless error, for
28 the trial court to rely on those convictions as aggravating
factors." Id., Exh. K at 7.

1 v. Martinez, 210 Ariz. 578, 115 P.3d 618 (2005); Arizona v.
2 Henderson, 210 Ariz. 561, 115 P.3d 601 (2005). The sentencing
3 in Martinez was upheld upon review by the United States Supreme
4 Court. See Martinez v. Arizona, 546 U.S. 1044, 126 S. Ct. 762,
5 (2005).

6 **B. Petitioner also alleges his Fourteenth Amendment**
7 **right to due process of law was violated because the prosecution**
8 **was vindictive; Petitioner asserts the indictment was amended to**
9 **include more serious charges because he refused to accept a plea**
10 **deal (Ground II).**

11 Petitioner raised this issue in his first state action
12 for post-conviction relief. In a decision issued August 13,
13 2007, the state trial court summarily concluded the claim was
14 precluded or not colorable.

15 Petitioner did not timely seek review of this decision
16 by the Arizona Court of Appeals. Therefore, Petitioner failed
17 to properly exhaust this claim in the state courts by raising to
18 the state's "highest court."

19 In reply to Respondents assertion that he procedurally
20 defaulted some of his federal habeas claims in the state courts,
21 Petitioner contends he did not properly exhaust his claims
22 because the Arizona trial court did not grant his properly-filed
23 motion for an extension of time to appeal the decision denying
24 Rule 32 relief to the Arizona Court of Appeals. Petitioner also
25 asserts that his direct appeal contained only a Blakely claim
26 regarding the validity of his sentence because he accepted the
27 limitation of his appeal to this single issue as because it was

1 the advice of his appointed appellate counsel.

2 Petitioner has not shown cause for, nor prejudice
3 arising from his procedural default of the claim. Neither has
4 Petitioner established a fundamental miscarriage of justice will
5 occur if the merits of the claim are not considered.

6 Additionally, Petitioner's claim may be rejected on the
7 merits because the re-indictment of a defendant after his
8 rejection of a plea offer, without other evidence of animus, is
9 not prosecutorial vindictiveness or a violation of due process.
10 See Bordenkircher v. Hayes, 434 U.S. 357, 364-65, 98 S. Ct. 663,
11 668-69 (1978); Adamson v. Ricketts, 758 F.2d 441, 448 (9th Cir.
12 1985), rev'd on other grounds by Walton v. Arizona, 497 U.S.
13 639, 110 S. Ct. 3047 (1990). See also Williams v. Bartow, 481
14 F.3d 492, 501-02 (7th Cir. 2007).

15 **C. Petitioner further contends that his Fifth Amendment**
16 **right to be free of double jeopardy was violated because his**
17 **crime involved only one victim and because the indictment was**
18 **amended to alter the initial charges against him to more serious**
19 **charges (Ground III).**

20 Petitioner raised this issue in his first state action
21 for post-conviction relief. The state trial court summarily
22 concluded the claim was precluded or not colorable.

23 Petitioner did not timely seek review of this decision
24 by the Arizona Court of Appeals. Therefore, Petitioner failed
25 to properly exhaust this claim in the state courts by raising to
26 the state's "highest court." Petitioner has not shown cause
27 for, nor prejudice arising from his procedural default of the

1 claim. Additionally, Petitioner has not shown a fundamental
2 miscarriage of justice in this regard because this claim asserts
3 Petitioner's legal, as opposed to factual, innocence of the
4 crimes of conviction. Accordingly, relief may not be granted on
5 the merits of the claim.

6 **D. Petitioner asserts that he was denied his right to**
7 **the effective assistance of trial, appellate, and post-**
8 **conviction counsel.**

9 Petitioner raised ineffective assistance of trial and
10 appellate counsel claims in his state action for post-conviction
11 relief. The state trial court found the claims were not
12 colorable, a decision Petitioner did not timely appeal to the
13 state Court of Appeals. Accordingly, Petitioner procedurally
14 defaulted this claim in the state courts.

15 Petitioner has not shown cause for, nor prejudice
16 arising from his procedural default of his ineffective
17 assistance of trial and appellate counsel claims. Petitioner
18 did not properly exhaust an ineffective assistance of appellate
19 counsel claim in the state courts and, accordingly, the
20 assertion that his appellate counsel was ineffective does not
21 provide cause for Petitioner's failure to timely raise an
22 ineffective assistance of trial counsel claim.

23 Additionally, there is no constitutional right to the
24 effective assistance of post-conviction counsel and,
25 accordingly, this allegation does not provide cause for
26 Petitioner's failure to properly exhaust his ineffective
27 assistance of trial and appellate counsel claims nor is it a
28

1 claim cognizable on federal habeas review.

2 Furthermore, Petitioner has not established that a
3 fundamental miscarriage of justice will occur if the Court does
4 not consider the merits of his ineffective assistance of trial
5 and appellate counsel claims. Petitioner has not shown
6 constitutional error occurred during his trial, resulting in the
7 conviction of one who is actually innocent.

8 **IV Conclusion**

9 Petitioner properly exhausted his Sixth Amendment
10 sentencing claim by presenting it to the Arizona Court of
11 Appeals in his direct appeal. However, the state court's
12 decision that Petitioner's federal constitutional rights were
13 not violated as he asserts was not contrary to, nor an
14 unreasonable application of federal law. Petitioner
15 procedurally defaulted his other claims in the state courts by
16 not properly presenting them to the Arizona Court of Appeals in
17 a procedurally correct manner. Petitioner has not shown cause
18 for, nor prejudice arising from his procedural default of these
19 claims and, accordingly, relief may not be granted on the merits
20 of the claims.

21 **IT IS THEREFORE RECOMMENDED that** Mr. Myles' Petition
22 for Writ of Habeas Corpus be **denied and dismissed with**
23 **prejudice.**


24 This recommendation is not an order that is immediately
25 appealable to the Ninth Circuit Court of Appeals. Any notice of
26 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
27 Procedure, should not be filed until entry of the district

1 court's judgment.

2 Pursuant to Rule 72(b), Federal Rules of Civil
3 Procedure, the parties shall have ten (10) days from the date of
4 service of a copy of this recommendation within which to file
5 specific written objections with the Court. Thereafter, the
6 parties have ten (10) days within which to file a response to
7 the objections. Pursuant to Rule 7.2, Local Rules of Civil
8 Procedure for the United States District Court for the District
9 of Arizona, objections to the Report and Recommendation may not
10 exceed seventeen (17) pages in length.

11 Failure to timely file objections to any factual or
12 legal determinations of the Magistrate Judge will be considered
13 a waiver of a party's right to de novo appellate consideration
14 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
15 1121 (9th Cir. 2003) (en banc). Failure to timely file
16 objections to any factual or legal determinations of the
17 Magistrate Judge will constitute a waiver of a party's right to
18 appellate review of the findings of fact and conclusions of law
19 in an order or judgment entered pursuant to the recommendation
20 of the Magistrate Judge.

21 DATED this 26th day of January, 2009.

22
23
24 
25 Mark E. Asper
26 United States Magistrate Judge
27
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